APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,296

Paul O. Johnson, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 21, 1969.]

Before BLACKMUN, MEHAFFY and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

The defendant was convicted on two counts of a four-count indictment:[1] (1) filing a false claim on October 8, 1963, against the United States in violation of 18 U.S.C.

[1]The defendant was acquitted on Counts I and II. These counts charged that the defendant had, in 1962, made a false claim in violation of §287 (Count I) and a false statement in violation of §1001 (Count II). Specifically, they charged that, in 1962, the defendant, in violation of the soil bank contract, lost control of approximately thirty-nine acres of land upon which the claim was based by a sale of it to Southern Heights Lumber Company. The defendant testified that the transaction with Southern Heights Lumber Company was intended to be a security transaction not a sale. An officer of Southern Heights Lumber Company, Rex Kreider, gave similar testimony concerning the intent of the parties. The jury presumably accepted this version of the transaction notwithstanding the fact that Kreider, in the name of Southern Heights Lumber Company's successor, subsequently entered into several contracts for the sale of approximately twenty of the thirty-nine acres.

§287[2] (Count III of the indictment), and (2) making false statements on October 8, 1963, to a department or agency of the United States in violation of 18 U.S.C. §1001 (Count IV of the indictment).[3]

The defendant received similar sentences on each count, imprisonment for sixty days and a fine of $10,000, the sentences to be served concurrently and the total fine to be limited to $10,000.

The defendant's request for a judgment of acquittal notwithstanding the jury verdict or, in the alternative, a new trial, was denied by the trial judge, Elmo B. Hunter. *United States* v. *Johnson,* 284 F.Supp. 273 (W. Mo. 1968).

The defendant gives four principal reasons why his conviction should be reversed on this appeal: (1) The trial court should have required the government to elect between Counts III and IV. The conviction on both counts subjected the defendant to double jeopardy. (2) The indictment failed to allege facts constituting an offense under §§287 or 1001. The evidence to convict on either charge

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[2]"§287. *False, fictitious or fraudulent claims*

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §287.

[3]"§1001. *Statements or entries generally*

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

18 U.S.C. §1001.

was insufficient. (3) The trial court deprived the defendant of an opportunity to assert a permissible defense—that of substantial performance. (4) Sections 287 and 1001 are unconstitutionally indefinite and vague as applied to the defendant's actions. Thus, his conviction is violative of the due process clause of the Constitution of the United States.

There is no showing that the defendant was prejudiced by being required to stand trial on both counts. *Wangrow* v. *United States,* 399 F.2d 106, 112 (8th Cir.), *cert. denied,* 393 U.S. 933 (1968). As the sentences on Counts III and IV are concurrent, it is unnecessary for us to consider the merits of the defendant's contention that conviction on both counts subjected him to double jeopardy. *Chavez* v. *United States,* 387 F.2d 937, 939 (9th Cir. 1967).[4]

In view of the concurrency of the sentences, we limit our review to those facts and issues relating to the defendant's conviction under Count III. In summarizing the facts, we view the evidence in the light most favorable to the government.

THE INDICTMENT

Count III of the indictment charged that on October 8, 1963, the defendant presented to the Agricultural Stabilization and Conservation County Committee of Greene County, Missouri, a claim for $4,317.20 pursuant to the Soil Bank Conservation Reserve Program, knowing that the claim was false, fictitious and fraudulent and that he was not entitled to that sum because: (1) he had lost control of ninety acres of reserved land, (2) he had destroyed approved cover on reserved land by constructing roads, sewers, water lines, gas lines and houses, and (3) he had

[4]The defendant's contention is open to question. See, *Gore* v. *United States,* 357 U.S. 386 (1958); *Blockburger* v. *United States,* 284 U.S. 279 (1931); *Hattaway* v. *United States,* 399 F.2d 431 (5th Cir. 1968); *Cardarella* v. *United States,* 375 F.2d 222 (8th Cir.), *cert. denied,* 389 U.S. 882 (1967).

caused a crop of hay to be harvested from the reserved land, all in violation of §287.

THE FACTS

The defendant and his wife were the owners of 450 acres of land in Springfield, Missouri. On December 11, 1959, they entered into a soil bank contract with the Greene County Agriculture and Stabilization Committee.[5] The contract covered the period January 1, 1960, through December 31, 1969. By the terms of the contract, 282 acres were designated as a conservation reserve. This acreage was divided between four fields: A, B, C and D. The contract required that the owners establish and main protective vegetative cover of the reserve. It also provided: that no crop could be harvested from the conservation reserve during the contract term; that loss of control of all or part of the land by sale, or otherwise, terminated the contract with respect to the acreage over which the control was lost; that the owners were to report promptly to the Greene County ASC the sale of any land in the reserve; and, that the owners should not "file a claim for a payment to which he knows he is not entitled."

At the time the contract was signed, an acreage reporter for the County ASC checked the fields for acreage, cover, previous land use and eligibility. The reporter told the defendant that if he developed any part of the reserve area, the developed portion would be ineligible for benefits. He was also told that before he undertook development of any part of the reserve, he should discuss the matter with the county committee.

In April, 1960, the defendant was told by the County ASC Manager that a sale of a part of the reserve to a de-

[5]The terms of the contract were essentially a reflection of the regulations in force at that time. 24 Fed. Reg. 7987-8001 (1959).

velopment corporation, of which the defendant was a stockholder, would terminate the contract as to the portion sold.

In July, 1961, an employee of the Greene County ASC conducted a compliance check. This check indicated that a tennis court and a tent had been placed on Field B, and that a number of homes had been built on Field C. The county committee subsequently confirmed the employee's findings. The committee then contacted the defendant and informed him that he was required to make application to take the land out of the contract before development was undertaken. The committee, nevertheless, permitted the contract to be modified and reduced the 1961 payments accordingly.

In 1962, the defendant's land was again inspected. The inspection disclosed that additional homes had been built on the reserve, that a street had been laid out in Field C and that Field B was being used for a park and playground. The defendant was again warned that no construction was to be started without the land being first taken out of the contract. The committee, nonetheless, permitted modification of the contract by eliminating Field B from the reserve reducing the acreage in Field C and reducing payments. Two hundred and fifty-one acres of land remained in the reserve after the 1961 and 1962 modifications.

In November of 1961, the defendant and his wife executed a deed of trust covering thirty-nine acres of land in Fields C and D. This deed of trust and an accompanying promissory note were transferred to Rex Kreider and wife. The next year, the promissory note was cancelled and the property conveyed by the deed of trust was released from the lien. A warranty deed was then recorded which purported to convey the thirty-nine acres to Southern Heights Lumber Company of which Kreider was an officer. The defendant and Kreider claimed that this trans-

action was a security agreement, an assertion apparently accepted by the jury.[6]

In June of 1963, the defendant entered into a contract for sale with Kenneth Cantrell for thirty-three acres of Field C. In July, 1963, the defendant entered into a similar contract with Ezra and Henry Gibson for fifty-seven acres of the same field.

On October 8, 1963, the defendant went to the Greene County ASC office to obtain his soil bank check for 1963. The members of the committee, having heard rumors that the defendant had sold land in the conservation reserve, asked him if he had sold any of the land, and the defendant replied, "No." The defendant stated that he had contracted to sell 105 acres for development, but that the contract would not take effect until 1964. The defendant was again informed that he could not break cover, dig, build streets, lay sewer lines or do similar work until after the first of the year; and that if he did, he would have to refund any money drawn

The defendant did not inform the committee that he was then installing sewers and gas and water laterals on Fields C and D, or that he intended to continue to do so during the remaining months of the year.

The defendant then signed the Application and Annual Payment Statement shown below, and was given a certified check for $4,317.20.

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[6]As noted in n. 1, the defendant was acquitted on Counts I and II which were predicated upon this transaction. In the presentation of its case, the government, in an effort to establish loss of control, introduced evidence as to other transactions involving the thirty-nine acres. In June of 1963, the defendant and his wife and Kreider and his wife entered into a contract for the sale of land to Kenneth Cantrell. In July Kreider's company entered into a new contract in which it agreed to sell a designated number of lots to Cantrell. All of the lots were located in the disputed thirty-nine acres. Also in July, Kreider's company contracted to sell approximately three of the thirty-nine acres to Ezra and Henry Gibson. In September, Kreider and the defendant exchanged quit claim deeds covering land in the thirty-nine acres.

A7

FORM ASCS-52 (SOIL BANK) (8-9-61)

SOIL BANK - CONSERVATION RESERVE PROGRAM
APPLICATION AND ANNUAL PAYMENT STATEMENT

U. S. DEPARTMENT OF AGRICULTURE
AGRIC. STAB AND CONS. SERVICE

COCE AND FARM NO	CONTRACT NO.	PROGRAM YEAR	HAVE ALL ACREAGE ALLOTMENTS (OR BASES) BEEN COMPLIED WITH?
44-039 V-653	304A	1962	YES [X] NO [ ]

PART I - COMPLIANCE DATA AND COMPUTATION OF PAYMENT

1. DESIGNATED CONSERVATION RESERVE	2. SOIL BANK BASE	3. PERMITTED ACREAGE	4. MEASURED ACREAGE	5. IF 4 IS LARGER THAN 3, ENTER DIFFERENCE
251.0	Whole Farm	0	0	

LINE NO.	CONTRACTED ACREAGE	RATE PER ACRE	AMOUNT (COL. (D) TIMES COL. (C))	DEDUCTION IF PERMITTED ACREAGE EXCEEDED: (FACTOR) TIMES COL. (D)	DEDUCTION IF PERMITTED ACREAGE EXCEEDED: COL. (D) MINUS COL. (E)	PERCENTAGE SHARE	PAYMENT SHARE		PERCENTAGE SHARE	PAYMENT SHARE
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)		(I)	(J)
1	208.6	$ 17.20	$3587.92	$	$	%	$		%	$
2	42.4	17.20	729.28							
3										
4										
5										
6	TOTAL,		$4317.20	$	$	100	GROSS $4317.20			GROSS $
	SET-OFF-ASSIGNMENTS						$	SET-OFF-ASSIGNMENTS		$
	PRODUCER (NAME AND ADDRESS) Paul O. Johnson 1954 S. Glenstone Springfield, Mo.						NET PAYM'T $4317.20	PRODUCER (NAME AND ADDRESS)		NET PAYM'T $

PART II - PRODUCER'S CERTIFICATION

I hereby certify that for the program year indicated above I have complied with and will comply with all the requirements under the Conservation Reserve Program and that the gross payment shown hereon to be due me, is correct and will not cause the total of all the gross annual payments due me on all farms in which I have an interest for the program year indicated above, to exceed $5,000. I hereby apply for the payment shown hereon to be due me.

DO YOU HAVE AN INTEREST IN THE ANNUAL PAYMENT UNDER THE CONSERVATION RESERVE PROGRAM ON ANY OTHER FARM IN THIS COUNTY OR ANOTHER COUNTY OR STATE? YES [ ] NO [X]

(If "yes", list locations of farm on reverse side.)

PRODUCER'S SIGNATURE: Paul O. Johnson — DATE: 10/5/63

DO YOU HAVE AN INTEREST IN THE ANNUAL PAYMENT UNDER THE CONSERVATION RESERVE PROGRAM ON ANY OTHER FARM IN THIS COUNTY OR ANOTHER COUNTY OR STATE? YES [ ] NO [ ]

(If "yes", list locations of farm on reverse side.)

PRODUCER'S SIGNATURE: _____ DATE: _____

PART III - APPROVAL FOR PAYMENT

All requirements under the Conservation Reserve Program have been complied with an issuance of sight drafts to the payees in the amounts shown in Part I hereof is approved as of the date below.

FOR ASC COUNTY COMMITTEE (Signature): Charles W. Faircloth — DATE: 10-8-63

PART IV - SIGHT DRAFTS ISSUED

DRAFT NO'S.	DATE OF DRAFTS
[illegible]	10/5/63

U.S. GOVERNMENT PRINTING OFFICE 1961 O—607173

After signing the application, the defendant was again warned by an ASC employee not to break or destroy any of the cover, or put any streets or sewers on the land until after the first of the year.

Installation of gas, water laterals and sewers on Fields C and D, and construction of homes and streets on Field C continued during the remainder of the year.

On November 21, 1963, the defendant conveyed the fifty-seven acres of land to the Gibsons.[7]

An employee of the defendant harvested hay from Field A, two-thirds of which he took home and one-third of which was placed in the defendant's barn.

We turn to a discussion of the defendant's contentions relating to Count III. In so doing, we note that they were given thoughtful consideration by Judge Hunter and were properly decided by him. We, therefore, will not reconsider them in as much detail here.

AN INDICTABLE OFFENSE WAS NEITHER ALLEGED OR PROVED

The heart of the defendant's argument is that his submission of the application for payment did not constitute submitting a false claim within the meaning of §287. He argues that his submission amounted to nothing more than a statement that according to his understanding of the contract between him and the government, he was entitled to receive a payment of $4,317.20. He contends that the trial

[7]Before this date, the Gibsons had entered into several contracts for developments on the fifty-seven acres. On October 15, 1963, Henry Gibson entered into a contract for the installation of water and gas laterals. On October 26, 1963, the Gibsons entered into a contract for the installation of sanitary sewers and concrete paving and integral curbing. All these projects were started and many of them completed before the end of the year.

The record does not reflect when the property sold to Cantrell was conveyed.

court's decision establishes, for the first time, a rule that a mere declaration that a person has complied with his contract will support a criminal fraud charge. He cites *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States* v. *Outer Harbor Dock & Wharf Company*, 124 F. Supp. 337 (S.D. Cal. 1954); and 23 AmJur, Fraud and Deceit, §27, in support of his position.

The trial court properly rejected the defendant's arguments. *United States* v. *Johnson, supra* at 278-79. The court submitted questions as to the falsity of the claim and the defendant's intent to the jury with appropriate instructions.

The jury was justified in finding that the defendant's claim was false and that it was not based on a "reasonable and permissible [conclusion] as to the legal effect of [the contract]," *United States* v. *Outer Harbor Dock & Wharf Company, supra* at 345.

The jury was also justified in finding that the defendant knew that the claim was false and that he intended to defraud the government. The defendant applied for and accepted payment: (1) knowing that he had lost control over a portion of the reserved land by selling it; (2) knowing that he had destroyed cover on the reserved land by constructing roads, utilities and homes on it; (3) knowing that he had harvested a crop of hay on the reserved land; (4) knowing that these acts were violative of his contract with the government; (5) knowing that the government was unaware of the violations; and (6) knowing that he was not entitled to receive the sum of $4,317.20.

The defendant's reliance on *Diogo* and *Outer Harbor* is misplaced. Those cases involved prosecutions under §1001. Assuming, however, that the general principles enunciated in them are equally applicable to prosecutions under §287, they give no comfort to the defendant.

In *Diogo,* the defendants were convicted of having falsely represented to immigration authorities, in violation of 18 U.S.C. §1001 and §1546, that they were married. The Court held that the government had failed to establish that the statements of each defendant regarding his marital status was false or that the statements were known by the defendants to be false at the time they were made. The Court stated:

> "In construing these statements, it is well established that we must look to the meaning intended by the appellants themselves, rather than to the interpretation of the statements which the immigration authorities *did in fact make,* or even to the interpretation which the authorities *might reasonably have made.* * * *
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> * * *
>
> "We do not suggest that a court must accept as conclusive the meaning which a defendant, in a prosecution such as this, ascribes to the words he has used. If this were the rule to be applied, every person accused of perjury or false representations could assert his understanding of the words used in such a way as to preclude any possibility of conviction. * * * In a prosecution for perjury or false representation, absent fundamental ambiguity of the kind found in Lattimore, the question of what a defendant meant when he made his representation will normally be for the jury. * * * Where, as here, however, no evidence is presented on the question, it is incumbent upon the Government to negative any reasonable interpretation that would make the defendant's statement factually correct."

United States v. *Diogo, supra* at 905-06, 907 (Emphasis included).

Here, the evidence established that the defendant's claim was false and that he knew of its falsity. The gov-

ernment effectively negated any construction of the contract that would make the defendant's statement factually correct.

In *Upper Harbor*, the government charged that the defendants had falsely represented to the government that they were obligated under a lease with the City of Los Angeles to remove warehouse buildings and installations erected by the Navy on land leased by the City to the defendant company. The District Court held that the defendant company was so obligated; therefore, there had been no misrepresentation. In so finding, it commented that criminal fraud was not to be inferred from a reasonable and permissible conclusion as to the legal effect of a contract. *United States* v. *Outer Harbor Dock & Wharf Company*, *supra* at 345.

In the instant case, there was no such "reasonable and permissible conclusion" in that the defendant knew that he was violating the terms of the contract. The most that can be said for his defense is that he might have had reason to expect that his 1963 violations would be treated in the same manner as the earlier ones.

The defendant's contention, that there are no other cases involving prosecutions under §287 or its predecessor for failure to comply with the terms of a contract with the government, is without merit. See, *Imperial Meat Company* v. *United States*, 316 F.2d 435 (10th Cir.), *cert. denied*, 375 U.S. 820 (1963); *United States* v. *United States Cartridge Co.*, 95 F.Supp. 384, 393 (E.D. Mo. 1950), *aff'd*, 198 F.2d 456 (8th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953).

THE DEFENSE OF SUBSTANTIALITY

The defendant argues that he was deprived of the opportunity to present defenses essential to his acquittal: (1) he was not permitted to show that the government was seeking to cancel the conservation contract and assess penalties in a pending civil proceeding, and (2) he was not permitted to show that the actions serving as the basis for the indictment were not of such a substantial nature as to justify terminating the contract or assessing a civil penalty against him and, thus, could not serve as the basis for an indictment under §287. He relies on *Shay* v. *Agricultural Stab. & Conserv., State Com. for Ariz.*, 299 F.2d 516 (9th Cir. 1962), and *United States* v. *Maxwell*, 278 F.2d 206 (8th Cir. 1960).

The trial court properly refused to permit evidence as to the pending civil case. It pointed out that the defendant's purpose in submitting this evidence was to cause the jury to believe that the defendant would be sufficiently punished in the civil proceeding. *United States* v. *Johnson*, *supra* at 284-85.

The fact that remedies are provided by statute for breach of the contract does not negate the right of the government to indict and convict under §287 if the elements of the crime are established. *United States* v. *Gilliland*, 312 U.S. 86, 95-96 (1941); *Cohen* v. *United States*, 201 F.2d 386, 392, 393 (9th Cir.), *cert. denied*, 345 U.S. 951 (1953). It follows that evidence as to the pending civil proceedings is immaterial.

Questions of materiality are for the trial court. Its rulings will not be disturbed by this Court unless there is a clear showing of an abuse of discretion. No such showing has been made here.

Further, we are convinced, as was the trial court, that the defendant was given an opportunity to prove that any acts of noncompliance were immaterial, unknowing, and not intended to defraud the government.

The court did, as the defendant argues, instruct the jury: (1) that the defendant was required to maintain cover, (2) that he was prohibited from harvesting crops, and (3) that he was required to maintain control of the land. It further instructed, however, that the defendant could not be found guilty unless the government proved beyond a reasonable doubt:

> "* * * 1.) That the defendant did make or present a Claim to a department or agency of the United States. 2) That such claim was false, fictitous, and fraudulent and material. 3) That the defendant knew at the time that the claim was false, fictitious, and fraudulent. 4) That the claim was made upon or against the United States or any department or agency thereof."

The court also permitted the defendant to argue at length that any violations of the contract by him had been trivial, immaterial and insubstantial:

> "* * * Mr. Wickhiser told you what was involved, about three or three and a half acres that was disturbed by the laying of some laterals—say three acres. That's three times seventeen dollars and twenty cents, or fifty-four dollars and sixty cents for a part of a year—not more than a third of a year, probably seventeen dollars and twenty cents. This is what this whole lawsuit is about. Now, when we weigh that, is that material? * * *
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> * * * *
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> "* * * Then we come into this hay business. They come around November 12th, 1963, or a day or so before, the man comes around and he asks Mr. Johnson if he can cut the hay, and he says: 'You'll have to go down and talk to the soil bank.' They go down

and the man comes out with a form prepared dated November 12th, 1963, saying that he's got a hundred and thirty-nine acres of hay on field D-1, 2 or 3 or something like that, and Mr. Johnson signs it. As far as he knows, he can't carry in his memory the maps or plats or that entire tract to know what was taken out or what was not. He was told that the soil bank people had said you can cut a hundred and thirty-nine acres of hay, and he paid for it. The soil bank people would have paid for it. Now, that's what that hay amounted to. * * *"

The defendant's reliance on *Shay* and *Maxwell* is misplaced. In *Maxwell*, this Court held that a state ASC committee is prohibited by statute[8] from canceling a conservation reserve contract or imposing a statutory fifty per cent penalty for a knowing and willful violation unless the nature of the violation is such as to defeat or substantially impair the purposes of the contract. We noted that lesser violations are to be adjusted as provided by law.[9] We stated that the trial court was completely justified in concluding that the violations were trivial and did not impair the purposes of the contract.—(Six colts strayed onto the reserve acres on a few occasions.) Our holding was required by the specific terms of the statute. Section 287 imposes no such obligation.

Similarly, *Shay* dealt with the specific requirements of the statute. In *Shay*, the District Court had affirmed the determination of the local committee that the defendants should be required to refund the entire payment received by them under a soil bank contract for grazing violations. The Ninth Circuit reversed and remanded holding that the judgment was erroneous in that the local committee had failed to make a finding, as required by the statute that the particular violation was of such a nature as to war-

[8]Soil Bank Program, ch. 327, §123, 70 Stat. 198; Soil Bank Program, ch. 327, §103, 70 Stat. 189; Soil Bank Program, ch. 327, §107, 70 Stat. 191.

[9]Soil Bank Program, ch. 327, §103, 70 Stat. 189.

rant termination of the particular contract. That is, its nature was such as to defeat or substantially impair the purpose of the particular contract.

THE CONSTITUTIONALITY OF §287

The defendant argues that §287 cannot be constitutionally applied to the defendant under the facts of this case because: (1) the defendant was not warned in the contract or the application that he would subject himself to criminal penalties by stating that he had fully complied with his contract when in fact he had not so complied; (2) the section uses language so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be criminal; and (3) the local ASC committee was given uncontrolled discretion to determine if land could be used in the last six months.

The constitutional vice, in a vague or indefinite statute, is the injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning. See, *American Communications Asso.* v. *Douds*, 339 U.S. 382, 412 (1950); *Winter* v. *New York*, 333 U.S. 507 (1948). It is true that, in the instant case, the claim statement itself contained no warning of criminal ramifications of falsely certifying that the requirements of the Conservation Reserve Program had been and would continue to be carried out, but none was required. Anyone signing the required claim statement was suitably charged with notice of the consequences of knowingly and willfully falsifying such statement. See, *United States* v. *Gilliland*, *supra* at 91.

Generally, under our system of criminal law, an individual is only punished when he has the requisite criminal intent accompanying the performance of the act. To have this requisite intent, the individual must be aware that

what he is doing is wrong. See, *Morissette* v. *United States*, 342 U.S. 246 (1952). But, this is not to say that he must have exact knowledge of the relevant criminal provisions governing his conduct. The defendant here was charged with knowingly making a false claim to a government agency. Sufficient evidence was introduced to establish that the defendant was well aware of the essential requirements of the contract with the government and that he acted in complete disregard of those requirements both before and after making the claim. The jury was thoroughly instructed that they must find that the defendant intentionally made false, fictitious and fraudulent claims and statements to find him guilty. The requirement that the government prove, as an essential element of their case, that the defendant's conduct was "willful" relieves the statute of the objection that it punished without adequate warning. See, *American Communications Asso.* v. *Douds*, *supra* at 412; *United States* v. *Houcks*, 224 F.Supp. 778 (W.D. Mo. 1963).

The defendant also contends that, as applied in this case, §§287 and 1001 are unconstitutional because the local committee was given the uncontrolled discretion to determine if land could be used in the last six months of the contract; therefore, delegating to them the power of determining whether a crime had been committed. This contention is without merit because no such uncontrolled discretion existed in the instant case. As the trial court correctly pointed out, the power to grant permission to use restricted lands only exists in the last six months of the contract period and that 1969, not 1963, was the last year of the contract. *United States* v. *Johnson*, *supra* at 284.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States v. *Johnson*
Cite as 284 F.Supp. 273 (1968)

UNITED STATES of America,
Plaintiff,

v.

Paul O. JOHNSON, Defendant.

No. 5989.

United States District Court
W. D. Missouri,
Southwestern Division.
April 5, 1968.

Prosecution for presenting false claim and for making false statement to agency of United States. On motion for judgment of acquittal notwithstanding the verdict and in the alternative for new trial, the District Court, Elmo B. Hunter, J., held that false certification by defendant that he had complied with and would comply with all requirements under conservation reserve program and that gross payment shown to be due was correct, when in fact defendant had begun to develop subdivision on part of land in program and had made arrangements for additional development to be undertaken, and without which certification county committee would not have made full payment, was material and would support a conviction for making false claim and false statement to agency of United States.

Motion overruled and denied.

1. Criminal Law Key 573

Right to speedy trial does not preclude rights of the public.

2. Indictment and Information Key 7

Where defendant's attorney was advised in May, 1966 of government's intention to present matter of defendant's activities in latter part of 1963 to grand jury and indictment was returned in March, 1967, within period of applicable statute of limitations, and there was no evidence of intentional or vexatious delay or unreasonable harassment, defendant was in no position to claim surprise or prejudice as result of delay in presenting matter to grand jury.

3. Criminal Law Key 29

Test to be applied to determine whether there are two offenses or only one is whether proof of any additional fact, not constituting an element of one of the offenses, is required to sustain conviction on the other.

4. Criminal Law Key 29

Separate offenses may be committed in same transaction where elements are different and proof required for conviction is different.

5. Indictment and Information Key 132(5)

Elements of offense of making or presenting false claim to agency of United States differ from elements of offense of making false statement or representation to agency of the United States and acts are intended to be treated as separate and distinct offenses, and refusing to require government to elect between counts of indictment charging both offenses was not error. 18 U.S.C.A. §§ 287, 1001.

6. Fraud Key 68
United States Key 121

Purpose of statute prohibiting making of false claim or false statement to agency of United States is to protect government against those who would cheat or mislead it in administration of its programs. 18 U.S.C.A. §§ 287, 1001.

7. Fraud Key 68

Mere fact that Soil Bank Act in providing civil penalties makes no additional provision by way of criminal sanctions does not render ineffective sections of criminal code prohibiting making of false claims or statements to agency of United States and would not preclude prosecution for making false certificate of compliance with requirements of conservation reserve program. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

8. Constitutional Law Key 82
Criminal Law Key 1213, 1214

Attempt by government to assess civil penalties against participant in conservation program for false certification of compliance with requirements of program, coupled with indictment and conviction for making false claim and false statement to government agency, did not subject defendant to cruel and unusual punishment or to excessive fines and did not constitute bill of attainder. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

9. Criminal Law Key 13

Statutes prohibiting making of false claim and false statement to agency of United States were not unconstitutionally vague as applied to defendant charged with making false certification of compliance with requirements of conservation reserve program. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, §116, 7 U.S.C.A. § 1804.

10. Fraud Key 68
United States Key 121

Statement of defendant participant in conservation reserve program that he had complied with and would comply with all requirements under program and that amount shown to be due was correct was not mere conclusion of law or legal opinion and would support conviction for making false claim and false statement to agency of United States. 18 U.S.C.A. § 1001; Universal Military Training and Service Act, § 12, 50 U.S.C.A. App. § 462.

11. Constitutional Law Key 42

Defendant, charged with making false claim and false statement to agency of United States government, as participant in conservation reserve program could not assert that operations of conservation reserve program were illegal or unconstitutional in view of fact that he voluntarily put himself in position to obtain benefits from program and did obtain them. Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

12. Fraud Key 68
United States Key 121

Under statute providing that payment may be made upon certificate of participant in conservation reserve program, in such form as Secretary of Agriculture may prescribe, that participant has complied with all requirements for such payment, Secretary in prescribing form that registrant certify that he has complied with all requirements under conservation reserve program was not shown to have exceeded his authority, and form of defendant's certification did not preclude conviction for making false claim and false statements in certifying compliance with requirements of program. Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

13. Constitutional Law Key 42

Participant in conservation reserve program charged with making false claim and false statement to government agency in connection with certification to agency that he had complied with requirements of program and that application showed correct amount due was in no position to assert that operations of conservation reserve program were illegal or unconstitutional in view of participant's having obtained benefits from program. Soil Bank Act, § 116, 7 U.S.C.A. § 1804; 18 U.S.C.A. §§ 287, 1001.

14. Fraud Key 68
United States Key 121

Participant in conservation reserve program charged with making false claim and false statement to government agency with respect to compliance with program and as to correctness of amount claimed to be due, who made no effort to comply with provision of county committee handbook for modification of contract to remove land devoted to nonagricultural use, could not avoid conviction on theory that handbook provision gave committee arbitrary power to grant or refuse permission to take land out of program. Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

15. Fraud Key 68
United States Key 121

False certification by defendant that he had complied with and would comply with all requirements under conservation reserve program and that gross payment shown to be due was correct, when in fact defendant had begun to develop subdivision on part of land in program and had made arrangements for additional development to be undertaken, and without which certification county committee would not have made full payment, was material and would support conviction for making false claim and false

statement to agency of United States. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

16. Criminal Law Key 935(1)

On motion for new trial following verdict of guilty, evidence will be taken in view most favorable to government.

17. Fraud Key 69

Evidence that participant in conservation reserve program certified that he had and would continue to comply with requirements of program and that amount claimed due was correct and that participant knew that he was not to take land out of program by developing it and that he was not to tear up or break cover on land and that participant did proceed with development established that defendant had knowledge of falsity of certification at time he made certification. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

18. Constitutional Law Key 257

Government is entitled to expect that participant in conservation reserve program making application for payment will act honestly in certifying compliance with requirements of program and correctness of amount claimed to be due, and fact that form on which defendant made certification contained no warning that he would be subject to criminal prosecution for false certification did not deprive defendant of due process of law. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

19. Fraud Key 68
United States Key 121

Application of criminal statutes prohibiting making of false claims and statements against agency of United States

would not defeat purpose of Soil Bank Act by subjecting participant in conservation reserve program to criminal penalties for making false certification of compliance with requirements of program and of correctness of amount claimed to be due in application. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

20. Fraud Key 69

Evidence supported finding that false certification by participant in conservation reserve program of compliance with requirements of program and of correctness of amount shown due on application was matter within jurisdiction of department or agency of United States as provided in statute prohibiting making of false statement or representation to department or agency of United States. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

21. Fraud Key 68

Under regulations permitting participant in conservation reserve program to destroy vegetative cover during last six months of contract for purpose of planting crop and permitting destruction of cover during last year of contract for purpose of summer fallow operations, defendant who broke cover for purpose of developing property at time when conservation contract had six years to run was not immune from prosecution for falsely certifying compliance with requirements of program and correctness of amount claimed to be due on application on theory that he had not cheated government out of anything. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

22. Criminal Law Key 338(7)

Fact that civil case was pending against defendant to recover penalties and money paid pursuant to conservation

reserve program could not properly be disclosed to jury in prosecution for making false claim and false statement in certification of compliance with program requirements for purpose of making jury believe that defendant would be sufficiently punished by civil action. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

23. Criminal Law Key 1170(1)

Refusal to permit defendant's counsel to inquire of government's witnesses concerning pending civil action to recover from defendant money paid under conservation contract for purpose of showing bias and prejudice in criminal prosecution for making false claim and statement in certification as to compliance with requirements of program was not prejudicial error, the government witnesses having no personal interest in outcome of pending civil case. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

24. Fraud Key 69

Evidence supported finding that defendant participant in conservation reserve program was aware that statements in certification of compliance with requirements of program and of correctness of amount shown due on application were false on date made. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

25. Fraud Key 69
United States Key 123

Evidence was sufficient to support conviction of participant in conservation reserve program for making false claim and statement to agency of government in connection with certification of compliance with requirements of program and of correctness of amount shown to be due on application. 18 U.S.C.A. §§ 287, 1001; Soil Bank Act, § 116, 7 U.S.C.A. § 1804.

26. Fraud Key 69

Instructions that false statement in certification to government agency should be found to be material if it had natural tendency to influence or was capable of influencing agency to which it was made was sufficient and did not permit finding of guilty if statement was false without requiring falsity to be material. 18 U.S.C.A. §§ 287, 1001.

27. Criminal Law Key 1166½(10)

Where during course of trial defense counsel endeavored to confuse jury as to issues of case, trial court's rereading indictment to jury with admonition that indictment was not evidence of defendant's guilt was not error and was not prejudicial.

28. Fraud Key 69

Where indictment containing statements relied upon in count charging making of false statement to agency of United States was twice read to jury and evidence of government focused throughout trial on statement set forth in indictment and there was no indication that government was relying upon or attempting to prove different statement, there was no confusion as to what statement jury was required to find false in order to convict defendant, and failure to specify in instructions statement alleged to have been made was not error. 18 U.S.C.A. §§ 287, 1001.

Bruce C. Houdek, U. S. Asst. Dist. Atty., Kansas City, Mo., for plaintiff.

Horace S. Haseltine, Springfield, Mo., A. L. Shortridge, Joplin, Mo., for defendant.

MEMORANDUM AND ORDER DENYING MOTION FOR NEW TRIAL

ELMO B. HUNTER, District Judge.

At a trial held herein defendant was found guilty as charged in Counts III and IV of the indictment. Briefly stated, Count III charges defendant with violation of 18 U.S.C. § 287 (false claim)[1] and Count IV charges defendant with violation of 18 U.S.C. § 1001 (false statement or representation).[2] Defendant has filed a motion entitled "Motion for Judgment or Acquittal Notwithstanding the Verdict and, In the Alternative, For a New Trial" (consisting of 19 pages), "Suggestions in Support of After Trial Motions" (consisting of 4 pages), and "Suggestions in Support of Defendant's After Trial Motions" (consisting of 31 pages). The "Motion For Judgment or Acquittal Notwithstanding the Verdict and, In the Alternative, For a New Trial" sets forth as grounds for the same points numbered I through XXII, some with numerous subparts. The "Suggestions in Support of After Trial Motions" submits "points and authorities" numbered I through XIV, the same bearing but little resemblance to the motion itself either in topics discussed or in the method of presentation. The "Suggestions in Support of Defendant's After Trial Motions", filed at a later date, follow the pattern used in the motion itself and, with some reframing of the issues, pre-

1. "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both."

sent the authorities relied upon. In undertaking to discuss with some clarity the various questions raised the Court has endeavored to group the points of error to some extent, and has taken up the matters in a sequence different from that presented by defendant.

Briefly stated, the government in this case alleged that defendant, a participant in the Conservation Reserve Program, in the fall of 1963 certified that he had complied with and would continue to comply with the requirements of the program and that the amount shown on the application form was the correct amount due him, when in fact he had prior thereto begun to develop a subdivision on a part of the land in the program and had made arrangements for additional development to be undertaken in the calendar year.

[1, 2] The Court considers first the issues raised relating to the indictment and its return. Defendant contends that the indictment should be quashed because of the delay in presenting the matter to the grand jury, relying upon the case of United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966). This contention is without merit. The record will demonstrate that the only attack on the indictment, and the first indication by defendant that there had been too great a delay in presenting the matter to the grand jury, was on the first day of trial, and then by bare motion only without supporting suggestions. The indictment was returned on March 11, 1967 and the counts on which defendant was found guilty relate to his activities in the latter part of 1963. The record of the trial shows that the investigation of this case required considerable time due to no small extent to the nature of defendant's business operations concerning the land in question during the time covered by the indictment. It was not a simple case to develop. Further, the exhibits attached

to the present motion by defendant demonstrate the government's candor in this regard in advising defendant's attorney as early as May of 1966 of the government's intention to present the matter to the grand jury. The teachings of the Ewell case, supra, actually support the government in this case. The Court there stated, supra at 122, 86 S.Ct. at 777 "We note, first, * * * that the new indictments * * * were brought well within the applicable statute of limitations, which is usually considered the primary guarantee against bringing overly stale criminal charges." Such is true in the case at bar, with the additional factor that defendant was advised well in advance of indictment that the government intended to seek such indictment. The Court in the Ewell case also observed that the right to a speedy trial is necessarily relative, and is consistent with delays and depends upon the circumstances in each case. While it secures rights to a defendant, "it does not preclude the rights of the public." United States v. Ewell, supra, at 120, 86 S.Ct. at 776. There being no evidence of intentional or vexatious delay or unreasonable harassment of defendant, he is in no position to claim surprise or prejudice under the circumstances of this case, United States v. Ewell, supra, Foley v. United States, 290 F.2d 562 (8th Cir. 1961), cert. den. 368 U.S. 888, 82 S.Ct. 139, 7 L.Ed.2d 88 (1961).

[3-5] Defendant's contention that the Court erred in refusing to grant its motion to require the government to elect between Counts III and IV is without merit. "The test to be applied to determine whether there are two offenses or only one is whether proof of any additional fact, not constituting an element of one of the offenses, is required to sustain a conviction on the other," Cardarella v. United States, 375 F.2d 222, 225 (8th Cir. 1967), cert. den. 389 U.S. 882, 88 S.Ct. 129, 19 L.Ed.2d 176 (1962). See also Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180,

76 L.Ed. 306 (1932), United States v. Cohn, 270 U.S. 339, 46 S.Ct. 251, 70 L.Ed. 616 (1926). Separate offenses may be committed in the same transaction where the elements are different and the proof required for conviction is different, Blockburger v. United States, supra. Briefly stated, the elements differ in that the offense described in § 287 (Count III) requires that a claim (for money or property) be presented to a department or agency of the United States, upon or against the United States, while the offense described in § 1001 (Count IV) requires only a statement or representation (need not involve money or property) within the jurisdiction of any department or agency of the United States. Moreover, the Congressional intent on this matter is clearly to treat these as separate and distinct offenses, for in 1940 section 80 of Title 18, U.S.C., which referred to both claims and statements, was divided into the two parts, present sections 287 and 1001.

[6-8] In an even broader attack on the indictment defendant contends that it was the intent of Congress that the civil penalties provided in the Soil Bank Act be the only penalties to which defendant could be subjected and that sections 287 and 1001 of Title 18 can have no application to the facts of this case. There is no merit in this contention. The very purpose of sections 287 and 1001 is to protect the government against those who would cheat or mislead it in the administration of its programs, United States v. Kapp, 302 U.S. 214, 58 S.Ct. 182, 82 L.Ed. 205 (1937), United States v. Gilliland, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941). The mere fact that the Soil Bank Act makes no additional provision by way of criminal sanctions does not render ineffective these sections of the criminal code or indicate that Congress intended to restrict their application, United States v. Bramblett, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955). Sections 287 and 1001 are applicable to the facts of this case and the indictment

pursuant to those sections is in accordance with law. The Soil Bank cases upon which defendant relies are not on point in that they are actions to review the civil penalties assessed against participants in the program and do not in any way touch upon the situation presented here. Nor does the indictment and conviction thereunder coupled with the attempt by the government to assess civil penalties[3] subject defendant to cruel and unusual punishment, to excessive fines, nor does it constitute a Bill of Attainder as defendant would suggest, without referring to any authorities. The Court is not aware of any rule of law that would prevent the government from availing itself of its civil remedies as well as enforcing the criminal law.

[9, 10] Defendant contends in a rather general way that 18 U.S.C. §§ 287 and 1001 are unconstitutionally vague and indefinite, and more particularly, that as applied to the facts of this case are unconstitutionally vague and indefinite. Such attack on the statutes themselves has been without success, United States v. Gilliland, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941), United States v. Houcks, 224 F.Supp. 778 (W.D.Mo.1963). As applied to the facts of this case, the attack is also without merit. The statement which the government alleges defendant falsely made is as follows:

> I hereby certify that for the program year indicated above I have complied with and will comply with all the requirements under the Conservation Reserve Program and that the gross payment shown hereon to be due me, is correct * * *.

Defendant contends that the above statement is merely a conclusion of law and a legal opinion. The term "comply" is defined in Webster's Third International Dictionary (unabridged) as "* * * to complete, accomplish, per-

3. The civil case is still pending and at this point neither the Court nor the parties are in a position to predict its outcome.

form what is due * * * conform or adapt one's actions (as to another's wishes) * * *." The above statement is not a mere conclusion of law or legal opinion. It is a statement in which defendant asserts he has done certain things and will continue to do certain things. The evidence shows defendant was familiar with the important requirements of the program.[4] It is not merely a statement that the law is thus and so, or that the law requires such and such. See Todorow v. United States, 173 F.2d 439 (9th Cir. 1949), cert. den. 337 U.S. 925, 69 S.Ct. 1169, 93 L.Ed. 1733 (1949), wherein the false statement under a section 1001 prosecution was the assertion that the truck (surplus property of the United States) was to be for the applicant's own use, when in fact it was to be for the use of another. McCoy v. United States, 169 F.2d 776 (4th Cir. 1948), cert. den. 335 U.S. 898, 69 S.Ct. 298, 93 L.Ed. 433 (1948), is to the same effect. In United States v. Uram, 148 F.2d 187, 188 (2nd Cir. 1945), in a prosecution under the predecessor of sections 287 and 1001, the defendant was charged with having caused a loan to be made "which was to be expended on the home of Mr. and Mrs. Royal V. Campbell and more particularly in reroofing the building and repairing the sidewalks and for no other purpose; [but] in truth and in fact as defendants well knew, the representations of the borrowers were false and the moneys received from said loan was [sic] not expended on the roof or sidewalk but for personal and private purposes in no way related to the aforesaid premises or on the said proposed improvements thereon." To the contention that the indictment was invalid because based on a statement of mere possible future occurrence, the court stated, at 189, "it is an allegation of a present statement and the assertion of existing

4. The evidence shows such important requirements as (1) not breaking the vegetative cover and (2) not harvesting a crop of hay on the land in the program were those which defendant had knowledge of and violated.

intent, and promise, to use the money for the specific purpose of" repairs. Likewise, see Russell v. United States, 222 F.2d 197 (5th Cir. 1955), where the false statement which defendant caused to be made, and which was held sufficient under section 1001, was the phrase "purchase of home" contained in applications for veteran's home loans, where the facts of the case showed the loan guaranties were not in fact for the benefit of the veteran applicants, but rather for the benefit of defendant. United States v. Rubinstein, 166 F.2d 249 (2d Cir. 1948), cert. den. 333 U.S. 868, 68 S.Ct. 791, 92 L.Ed. 1146, (1948), a prosecution under the predecessor of 50 U.S.C. App. § 462 for making false statements to the draft board, involved statements to the effect that defendant's functions with his employer were such that the successful continuance of the operations of the company depended upon his remaining with the company, and that it would be impossible to replace him without seriously hampering the operation of the company. The court, at 255, stated, "even if these statements were but expressions of opinion, pertaining to future matters only, the making of them implied that the makers believed them to be true. If this belief were not honestly entertained, therefore, the statements contained a misrepresentation of present fact."

United States v. Outer Harbor Dock & Wharf Company, 124 F.Supp. 337 (S.D.Cal.1954), cited by defendant, contains a good illustration of what a conclusion of law or mere legal opinion is really like and demonstrates that much more than that is involved in the case at bar. The statement alleged to have been made in the Outer Harbor Dock case, supra at 340, was "the Company 'was obligated under its lease with the City * * * to remove warehouse buildings and installations * * *.'" Another case relied upon by defendant is Jacobs v. United States, 359 F.2d 960, 965,

(8th Cir. 1966) which hardly supports the present contentions in that the statements allegedly made in that case were "the services for which payment is claimed have been performed in conformity with the provisions of my storage warehousing agreement with the" Commodity Credit Corporation. The other cases cited by defendant are not in point.

[11, 12] Defendant further contends that the conviction cannot stand because the certification required of defendant before he would receive his payment did not conform to the statute in that the statute provides, 7 U.S.C. § 1804, "payment * * * may be made upon the certificate of the claimant, in such form as the Secretary may prescribe, that he has *complied with all requirements for such payment* * * *" (emphasis supplied) while the certification which defendant signed provides he has "complied with and will comply with *all the requirements under the Conservation Reserve Program* * * *" (emphasis supplied). Such contention is without merit. In the first place, defendant is in no position to assert the operations of the Conservation Reserve Program are illegal or unconstitutional in view of the fact he voluntarily put himself in a position to obtain the benefits from said program (and has obtained them), and when he has under that program attempted to mislead and cheat the government, Kay v. United States, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607 (1937), United States v. Kapp, 302 U.S. 214, 58 S.Ct. 182, 82 L.Ed. 205 (1937), Humble Oil and Refining Company v. United States, 198 F.2d 753 (10th Cir. 1952), cert. den. 344 U.S. 909, 73 S.Ct. 328, 97 L.Ed. 701 (1952). Secondly, the statute permits the Secretary to prescribe the form to be used and there is no showing that the Secretary exceeded his authority in prescribing the form

used for the Conservation Reserve Program, 7 U.S.C. §§ 1831-1837.[5]

[13, 14] Much along the same lines, defendant makes reference to "Regulation 57" (government's exhibit 58, paragraph 57 from the county committee conservation reserve handbook), contending that the same is unconstitutional in that it gives the committee arbitrary power to grant or refuse permission to take land out of the Conservation Reserve Program. That paragraph provides in pertinent part:

> Contracts shall be modified to remove land devoted to nonagricultural use * * * If the county committee gives prior approval for the nonagricultural use, the destruction or failure to maintain the conservation use on such land shall not be a violation of the contract.

What has been stated above with regard to defendant's lack of standing to now assert the program or provisions thereof are illegal applies to this contention. Further, the record indicates that the provision quoted above was promulgated pursuant to Regulation 485.511 in due course and in proper manner. Perhaps even more importantly, the record clearly demonstrates that defendant made no effort to bring himself within the terms of that paragraph; he made no attempt to obtain prior approval.

[15] Defendant contends that the certification could not be considered a perversion of any function of the committee, the contract, or the Conservation Reserve Pro-

5. Defendant makes much in his brief of 7 U.S.C. § 1823(b) and its provision that when the Secretary determines the producer has complied with the *acreage reduction requirements* he shall be paid. Suffice it to say that section 1823(b) deals with the "Acreage Reserve Program" and defendant was in the "Conservation Reserve Program," the latter program requiring more than merely taking land out of production.

gram; the certification could not be considered material; and it had no natural tendency to influence. As to its materiality, there is no dispute but that defendant would not have received his payment had he not made the certification as the statute and regulations required. It is very material. As to its natural tendency to influence, or to pervert any function of the committee, contract, or program, the members of the county committee testified that had they known the defendant was in the process of developing the acreage on which he made the claim and in support of which the statement was made, they would not have made the full payment. The members of the committee testified that during the late summer of the year the various land in the Conservation Reserve Program would be inspected for compliance, but that they also placed reliance on the certification of the participant. Congress, in establishing the program, recognized the need to rely upon the representations of the participants in order to make the program functional and expressly provided for the certification of compliance. Defendant cannot escape the consequences of his acts by arguing that the members of the committee should have made more inspections of his property in the program and should not have relied upon his representations. The jury passed upon these contentions and found against defendant under the Court's instructions. In support of the contentions that the statement was not material, that it would not have a natural tendency to influence, and could not be considered a perversion of the Conservation Reserve Program, defendant relies on the following cases: United States v. Maxwell, 278 F.2d 206 (8th Cir. 1960); Shay v. Agricultural Stabilization and Conservation, State Committee for Arizona, 299 F.2d 516 (9th Cir. 1962); Friedman v. United States, 374 F.2d 363 (8th Cir. 1967); Bartlett and Company; Grain v. United States, 353 F.2d 338 (10th Cir. 1965); Paternostro v. United States, 311 F.2d 298 (5th Cir.

1962); United States v. Diogo, 320 F.2d 898 (2d Cir. 1963); and Jacobs v. United States, 359 F.2d 960 (8th Cir. 1966). These cases have all been carefully considered by the Court and have been found to be not in point in view of the facts of the case at bar. The Maxwell and Shay cases are civil cases involving reviews of agency determinations that Soil Bank Contracts had been violated and that the same should be terminated for that reason. Each of the cases acknowledged the statutory provision that only a violation of a substantial nature will warrant termination of the contract, 7 U.S.C. § 1831(a) (6) (A). 7 U.S.C. § 1831(a) (6) (B) provides other civil remedies in the event there has been a violation of the contract which is of such a nature as not to warrant termination.

The other cases do involve criminal actions under the false statement and false claims statutes, but a brief recitation of the facts and issues involved in each will demonstrate their inapplicability to the facts of this case. The Friedman case involved the giving of a false statement to the Federal Bureau of Investigation regarding a beating which the defendant had purportedly received at the hands of a state highway patrol officer. In setting forth the issue on which the decision turned the court, 374 F.2d at 365, stated: "This question [whether the indictment alleges a violation of section 1001] is resolved by determining if the giving of false information to the F.B.I. relative to a violation of the criminal law is a 'matter within the jurisdiction of any department or agency of the [government].'" The Court concluded that the matter was not within the "jurisdiction" of the F.B.I., giving that term a restrictive reading. In the case at bar the matter was within the jurisdiction of a department or agency of the United States, as it discussed at a later point in this opinion.

The Bartlett case involved a statement by defendant to the Commodity Credit Corporation concerning the method under which grain was received in an effort to obtain an "in store" allowance. The government proved in that case that the statement was false and that defendant intended to induce the Commodity Credit Corporation to pay the "in store" allowance, but the government inadvertently proved an incompensable "F.O.B. bin site" transaction, not an "in store" transaction. Under such proof defendant's representations became immaterial for no "in store" allowance is ever paid for a "F.O.B. bin site" transaction. In the case at bar the government proved that defendant would have been entitled to the full payment if his certification had been true and he had continued to comply and that he was in fact given his full payment after he made the certification and prior to the time it was discovered his certification was false.

The Paternostro case involved negative answers given by defendant in response to questions propounded by an I.R.S. agent. In holding that such "mere negative answers" would not be considered "statements" within the meaning of section 1001, the court stated, quoting in part from other opinions, 311 F.2d at 303-305:

> "While the Special Agent may have been disappointed that defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in any way perverted. The only possible effect of exculpatory denials however false, received from a suspect such as defendant is to stimulate the agent to carry out his function."
>
> "The conduct Congress intended to prevent by § 1001, is the willful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether favorable agency action has actually resulted."

> Appellant in the case at bar made no statement relating to any claim on his behalf against the United States or any agency thereof; he was not seeking to obtain or retain any official position or employment in any agency or department * * *; and he did not aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of Government.

The false statement in the certification made by defendant was neither a merely negative response nor an exculpatory denial.

United States v. Diogo, supra, involved an alleged misrepresentation on the part of defendant concerning his marital status. Defendant, at the pertinent time, had stated he was married to an American citizen. The government's contention was that the marriage was merely a sham undertaken to keep defendant, an alien, from being deported. Pointing out that the charge of false representations requires proof of actual falsity, the court held that the government had failed, as a matter of law, to sustain its burden of proving that the marriage was void at the time defendant made the representation concerning his marital status. In the case at bar, the government introduced abundant evidence of the falsity of defendant's certification.

[16, 17] The Jacobs case involved certifications to the Commodity Credit Corporation by defendant, a warehouseman, concerning grain storage and services in regard thereto. As to the first five counts in that case the court concluded, "the only reasonable interpretation of the storage agreement, the commodity delivery notices, and the warehouse receipts precludes the attribution of falsity to the notices and receipts." There being no proof of falsity on those counts because defendant was permitted under the agreement to commingle the grain the court reversed the

conviction on those counts. On the remaining counts the court found that the government failed to prove defendant had knowledge at the time he certified the invoices that he was not entitled to receive the charges in question. In the case at bar the evidence showed defendant had been thoroughly advised of the terms of his Conservation Reserve Contract (see government's exhibit 9) at the time he put his land into the program, and that in the two years prior to 1963 as well as in October of 1963 defendant had been specifically told in some detail by the members of the county committee that he was not to take land out of the program by developing it, and that he was not to tear up or break the cover on the land. Taking the evidence favorable to the government, as the Court must do in this motion for new trial, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), it cannot be said that defendant lacked the requisite knowledge at the time he made the certification.

[18] Defendant contends that a literal application of sections 287 and 1001 deprives defendant of due process of law in that the form on which defendant made his certification "contains no warning that the producer by certifying compliance for payment will subject himself to criminal or civil penalties unless he is in 100% compliance with all requirements." The Court is aware of no ruling which would require a warning on the certification form that the applicant may be subject to criminal prosecution if he lies in his certification, nor is the need for such a warning apparent. Certainly the government is entitled to expect the applicant will act honestly in making his certification. Fraud, deceit and lying are not vague crimes for which a person must be given special notice and warning. As to the 100% compliance remark which appears elsewhere in the contentions as well

as here, the simple answer to that is the Court instructed the jury in pertinent part as to the elements of the false claim charge:

> * * * That the claim was false, fictitious, and fraudulent, *and material* * * * (emphasis supplied);

and as to the elements of the false statement charge:

> * * * That the statement was false, fictitious, and fraudulent, *and material.* * * * That the statement was *made on a material matter* * * * (emphasis supplied).*

Furthermore, the record will demonstrate that counsel for defendant fully argued defendant's theory that defendant's actions were not material or substantial deviations from the contract, that they were merely trivial, and that the statement was not material. Additionally, instruction number D informed the jury that defendant was required to maintain approved cover on the land "in accordance with good farming practice." No where was the jury advised defendant was required to be in 100% compliance with the terms of the regulations. Defendant's contention that his prosecution under sections 287 and 1001 violate due process of law is without merit.

[19] Likewise, defendant's statement that application of the criminal provisions against false claims and false statements will defeat the purpose of the Soil Bank Act is without merit. Congress has required that the applicant make certification of compliance, and there is nothing to indicate there is less need for government to be protected against fraud and deceit in the Soil Bank Program than in other programs it administers. See for example, United States v. Kapp, 302 U.S. 214, 58 S.Ct.

*Although not in the record, the Court, prior to closing argument, advised counsel for defendant the instructions would require that the statement be material and counsel fully argued this.

182, 82 L.Ed. 205 (1937), where the criminal sanctions against false statements were applied in a case under the Agricultural Adjustment Act. Far from defeating the purpose of the Act, the criminal provisions may well discourage those who are in the program from trying to cheat the government.

[20] Defendant's contention that the statement was not on a matter within the jurisdiction of any department or agency of the United States is without merit. On this point the Court found, and the evidence supports such finding, that the contract under which the payments were made was between the Secretary of Agriculture and the defendant; and the Secretary of Agriculture through the county committee had the power and authority to act upon the claim made for annual payment. Counsel for defendant agreed at the time the instructions were prepared that the Secretary of Agriculture, the Department of Agriculture, the Agricultural Stablilization and Conservation Service, the Green Agricultural Stabilization and Conservation County Committee, the Missouri Agricultural Stabilization and Conservation State Committee, and the Commodity Credit Corporation (which the evidence showed issued the payment to defendant) are governmental units established by Congress for the purpose of carrying out federal farm programs with public funds. The statute, 7 U.S.C. § 1805 expressly provides that the county committee shall be used in administering the Soil Bank Act. Clearly the statement was "in any matter within the jurisdiction of any department or agency of the United States" as that language is used in section 1001, United States v. Rainwater, 244 F.2d 27 affirmed, 356 U.S. 590, 78 S.Ct. 946, 2 L.Ed.2d 996 (1957) (8th Cir. 1957).

[21] Defendant contends that he could not cheat the government out of anything, relying upon Regulation 750.513(b) which provides:

> Notwithstanding any other provision of this subparagraph, (i) the destruction of the vegetative cover during the last six months of the contract period for the purpose of planting a crop which matures for harvest in a later year or preparing the land therefor, or (ii) the destruction of the vegetative cover during the last year of the contract period for the purpose of carrying out summer fallow operations, shall not be considered a violation of the contract.

Subject to the above quoted exception, the same regulation required that the producer agree to establish and maintain in accordance with good farming practice an approved vegetative cover or other approved conservation practices as specified in the contract. The answer to this contention is two-fold. First, defendant's contract was for a ten year period, 1959 through 1969, so any acts of destroying the cover in 1963 would not, of course, be "during the last six months of the contract period." Secondly, it does not appear that constructing roads, sewer systems, houses and the like is within the exception permitting breaking the cover in preparation for fall planting of a crop which matures in the following year. Defendant's reliance on Regulation 750.513(b) is misplaced.

[22, 23] Defendant contends that during the course of trial the Court erred in refusing to permit defendant's counsel to inquire of the government's witnesses concerning the pending civil action on file. Defendant contends such examination would have been proper to show bias and prejudice, relying upon the case of Villaroman v. United States, 87 U.S.App.D.C. 240, 184 F.2d 261, 21 A.L.R.2d 1074, (1950). Defendant's counsel were not prevented from inquiring as to any personal bias or prejudice

of the witnesses called by the government, and the record will reflect that wide latitude was accorded counsel for defendant in this regard. However, as to the pending civil suit, in which the United States, not the individual witnesses called by the government, is the party, counsel's statements to the court throughout the trial made it abundantly clear that any inquiry into the pending civil case would in fact have been for the purpose of putting before the jury the fact that the government was attempting to recover civil penalties and recover the money paid under the contract in an effort to make the jury believe defendant would be sufficiently punished by the civil action and should not be found guilty in the criminal action and not for legitimate impeachment purposes. Such a purpose would have been completely improper and would have resulted in confusing the jury and prejudicing the government which is also entitled to a fair trial. The Villaroman case is, of course, distinguishable on the facts. There the prosecuting witness (in an assault case) personally had pending a civil suit for damages against the defendant, alleging $50,000 damages for personal injuries. Here the various witnesses called by the government have no personal interest in the outcome of the pending civil case, are not parties to such case, and have had no control over it, i.e., whether to bring it or maintain it. Defendant has suffered no prejudice from the Court's ruling on this point, and its contention of error is without merit.

[24] Defendant contends that the government failed to show the claim was false on the date made anf further that the Court erred in permitting the government to show acts of defendant which occurred subsequent to October 8, 1963. It would serve no useful purpose to recite in detail the evidence, which is extensive, showing that at the time defendant made the claim it was false and he so knew. Suffice it to say that prior to October 8, 1963, rather ex-

tensive development had been commenced on the property by defendant or with his knowledge and consent, including, installation of gas and water laterals, and construction of sanitary sewers.[6] Also prior to that time defendant had entered into contracts for further and extensive development of the property, such contracts contemplating the construction of streets, storm sewers, and additional gas and water laterals. Prior to October 8, 1963, defendant had entered into a contract with the Gibsons to sell a portion of the property to the Gibsons, said contract calling for the Gibsons to develop the property. Evidence of acts of defendant, or with his knowledge and consent, occurring after October 8, 1963, was relevant and material particularly on the issue of his intent as of the time he made the statement, and this especially in light of the contents of the statement that he had "complied with and will comply with" the requirements. This evidence showed that work was done in 1963 under the contracts which defendant had entered into prior to October 8, 1963, and that other contracts were entered into by defendant or with his knowledge and consent shortly thereafter which also resulted in development work on the land in 1963.

[25] Defendant contends generally that there was no evidence to support a conviction on Counts III and IV. What has been stated above with regard to the evidence in the case sufficiently indicates that, contrary to defendant's contention, there was sufficient evidence to support a conviction on each count. A detailing of the evidence would serve no useful purpose.

[26] Defendant contends that the Court's instructions permitted a finding of guilty if the statement was false without requiring the falsity to be material. Such conten-

6. See the testimony of Gerald Tolar, gas and water laterals inspector, Ray Butrick, sanitary sewers inspector.

tion is without merit. As pointed out above the Court's instructions on this matter expressly provided that the statement be "material" and that it be "made on a material matter." The Court further instructed the jury:

> * * * an essential element of the offense of making a false, fictitious and fraudulent statement as charged in [Count IV] of the Indictment is that the statement be "material." In determining whether such a statement is material, the test is whether it has a natural tendency to influence or was capable of influencing agency action * * *. If you find beyond a reasonable doubt that defendant's statement * * * had a natural tendency to influence or was capable of influencing the agency to which it was made * * * to pay defendant on the basis of his statement, then you should find that such statement was material.

The Court's instructions as to "materiality" of the alleged false statement are in accord with those used in other cases involving section 1001, Blake v. United States, 323 F.2d 245 (8 Cir. 1963), Gonzales v. United States, 286 F.2d 118 (10th Cir. 1960), and cases cited therein. Defendant's counsel in their reliance upon the Maxwell and Shay cases, supra, lose sight of the fact that this is a criminal case brought under sections 287 and 1001 of Title 18, and in this action the Court is obliged to apply the terms of the criminal law and not merely general principles of contract law.

[27] Defendant contends the Court erred in re-reading the indictment to the jury and contends it was prejudicial to him. The record will demonstrate that on numerous occasions during the course of the trial counsel for defendant endeavored to confuse the jury as to the issues of the case, indicating that this case involved something other than criminal charges for making a false claim and false statement. It will further show that the Court was most lenient with counsel on this matter. However, in

order to assure a fair trial for the government and to remove some of the confusion which counsel for defendant had put into the case, on the occasion referred to the Court re-read the indictment to the jury so that they would clearly understand the charges being tried in this case. Prior to such reading the Court admonished the jury, as it had at the outset of the trial, that the indictment was no evidence of defendant's guilt. Defendant was not prejudiced, the re-reading was not error, and the cases cited by defendant are not in point with the facts of this case.

[28] Defendant contends that in instructing the jury the Court did not specify any particular statement which defendant was alleged to have made, and did not require that the false statement be the one charged in the indictment. This contention is without merit. The record will demonstrate that no such objection was made at the time the instructions were prepared and given, nor did counsel for defendant suggest that more specification as to the statement was needed in the instructions as prepared. The record will show that although counsel for defendant prepared no instructions for the Court's assistance on this matter, the Court gave them full opportunity to examine and criticize those prepared by the Court, and on a number of occasions modified them to suit defendant's counsel where criticisms were made. The Court on two occasions read the indictment to the jury explaining that the indictment contained the charges brought by the government, and the indictment clearly sets forth the statement relied upon in Count IV. The evidence of the government focused throughout the trial on the certification containing the false statement, and there was no indication that the government was relying upon or attempting to prove a different statement. The Court's instructions specifically referred to the pertinent Count of the indictment, Count IV, and more specifically stated:

> * * * If you find beyond a reasonable doubt that defendant's statement to the effect that he had complied with and will comply with all the requirements under the Conservation Reserve Program, in the years 1962 and 1963, and that the gross payment shown thereon to be due him is correct, had a natural tendency to influence or was capable of influencing agency action * * * to pay defendant on the basis of his statement, then you should find that such statement was material.

The record clearly shows that there was no confusion as to what statement the jury was required to find was false in order to convict defendant. The Court has fully and carefully considered the other claims of error raised by defendant, not specifically discussed above, and has found them to be totally lacking in merit and further discussion at this point would serve no useful purpose.

Each and every claim of error raised by defendant having been found to be without merit, defendant's motion for new trial or for a judgment of acquittal is hereby overruled and denied.

It is so ordered.

APPENDIX C

STATUTES

7 U.S.C. § 1804

§ 1804. Certificate of claimant

Subject to the provisions of section 1823(b) of this title, payment or compensation authorized by this chapter may be made upon the certificate of the claimant, in such form as the Secretary may prescribe, that he has complied with all requirements for such payment and that the statements and information contained in the application for payment are correct and true, to the best of his knowledge and belief. May 28, 1956, c. 327, Title I, § 116, 70 Stat. 196.

REGULATIONS

The pertinent Regulations of the Department of Agriculture 24 F.R. 7987, October 3, 1959, amended 28 F.R. 6643 provide:

(1) Sec. 750.501 (O) "Operator" means the person who is in charge of the supervision and conduct of the farming operations on the entire farm.

(2) Sec. 750.501 (P) "Producer" means any person who is an owner or landlord, cash tenant, standing-rent tenant, fixed-rent tenant, share tenant, sharecropper, * * *.

(3) 15.B, Paragraph 57, of the County Conservation Handbook (Gov't Exh. 58, R. 829) provides:

"Removal of land devoted to non-agricultural use: Contracts shall be modified to remove land devoted to non-agricultural use. Such uses include, but are not limited to highways, gravel pits, buildings and building lots. If the county committee gives prior approval for the non-agricultural use, the destruction of or failure to maintain the conservation use of such land shall not be a violation of the contract; if prior approval is not obtained, handle the case according to Paragraph 129. (a) Effective date: The effective date of the contract modification shall be the date on which the county committee determines that steps were taken to start the conversion to non-agricultural use. All contract provisions will apply to such land until the effective date of the modification."

INDICTMENT

COUNT III

"That on or about the 8th day of October, 1963, in the Western District of Missouri, PAUL O. JOHNSON did make and present to a department and agency of the United States a claim upon and against the United States and a department and agency thereof, knowing such claim to be false, fictitious and fraudulent, that is to say, that on or about said date, the defendant, PAUL O. JOHNSON, pursuant to the Soil Bank Conservation Reserve Program, made and presented to the Agricultural Stabilization and Conservation County Committee of Greene County, Missouri, a claim on Form ASCS-820 (Soil Bank), "Application and Annual Payment Statement," for payment by the United States Department of Agriculture of $4,317.20 on 251 acres of land to the defendant, PAUL O. JOHNSON, then knowing that he was not entitled to that sum because:

(1) he had lost control of 90 acres, more or less, of the land upon which said claim was based,

(2) he had destroyed and permitted to be destroyed the approved cover on land comprising part of the farm covered by said Conservation Reserve Contract number 304 by the construction of roads, sewers, water lines, gas lines, and houses, and

(3) he had caused to be harvested a crop of hay from land comprising part of the farm covered by Conservation Reserve Contract number 304,

all in violation of Section 287, Title 18, United States Code."

COUNT IV

"That on or about the 8th day of October, 1963, in the Western District of Missouri, PAUL O. JOHNSON, in a matter within the jurisdiction of a department and agency of the United States, did knowingly and wilfully make a false, fictitious and fraudulent statement and representation for the purpose of influencing the action of a department and agency of the United States, that is to say that on or about said date the defendant, PAUL O. JOHNSON, pursuant to the Soil Bank Conservation Reserve Program administered by the United States Department of Agriculture, did certify for the program year 1963 on a Form ASCS-820 (Soil Bank), 'Application and Annual Payment Statement,' that:

> 'I hereby certify that for the program year indicated above I have complied with and will comply with all the requirements under the Conservation Reserve Program and that the gross payment shown hereon to be due me, is correct . . .

then knowing said statement and representation to be false, fictitious and fraudulent for he had not complied and did not intend to comply with the requirements of the Conservation Reserve Program, in that:

> (1) he had not reported to the Agricultural Stabilization and Conservation County Committee of Greene County, Missouri, that he had lost control of approximately 90 acres of land comprising part of the farm covered by Conservation Reserve Contract number 304,
>
> (2) the grass cover on land comprising part of the farm covered by Conservation Reserve Contract number 304 had been destroyed by the installation of sewers, water lines, and gas mains,

(3) contracts had been entered into for the construction of roads, sewers, water lines, and gas mains on land comprising part of the farm covered by Conservation Reserve Contract number 304,

(4) building permits had been issued for the construction of houses on land comprising part of the farm covered by Conservation Reserve Contract number 304, and

(5) hay had been harvested from land comprising part of the farm covered by Conservation Reserve Contract number 304,

said statements having been made by PAUL O. JOHNSON for the purpose of influencing the Agricultural Conservation and Stabilization County Committee of Greene County, Missouri, to approve the issuance of a sight draft, all in violation of Section 1001, Title 18, United States Code."